IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1073

LEE PHARMACEUTICALS,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent,

DEN-MAT, INC., ROBERT L. IBSEN, W. RICHARD GLACE, FRED H. BROCK AND PROFESSIONAL PRODUCTS CO.,
Real Parties In Interest.

Brief of Real Parties In Interest in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Real Parties In Interest Den-Mat, Inc., Robert L. Ibsen, W. Richard Glace, Fred H. Brock, and Professional Products Co. herein oppose the Petition for a Writ of Certiorari.

The instant Petition arises out of the same fact circumstances as, and connects directly with, a prior Petition, No. 77-259, dismissed under this Court's Rule 60 on October 31, 1977, ... U.S. ....., 54 L.Ed.2d 295, which prior Petition involved the same petitioner, the same respondent, and the same real parties in interest. The instant Petition seeks, as No. 77-259 sought, the disqualification of the Honorable Jesse W. Curtis, United States District Judge for the Central District of California, from further participation as the assigned trial judge pursuant to 28 U.S.C. § 455(a).

JURISDICTION

Real parties in interest respectfully suggest that this Court lacks jurisdiction over the entire subject matter of the instant Petition as a direct consequence of petitioner's unqualified and unequivocal repudiation, before this very Court, of the procedures followed in the District Court. Thus, in Petition No. 77-259, filed August 31, 1977[1], petitioner herein stated:

> "The procedure suggested by the respondent judge's July 20, 1977 memorandum [Appendix ("App."), at 7a-8a] has no formal status, finds no sanction in any rule or statute including [28 U.S.C.] § 455 and hence, *can never result in any action of any meaningful nature.*" Pet. No. 77-259, at 12, n. 8, ¶ 3 (emphasis supplied).

Real parties in interest further respectfully submit that this Court lacks jurisdiction over the second "question" "presented" by petitioner. Petition ("Pet."), at 2. The affidavit of psychiatrist Leon Yochelson, Petition Appendix ("P.App."), at 34a-42a,

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[1]Hereinafter "Pet. No. 77-259". Concurrently herewith, real parties in interest have moved this Court for leave to refer to the records on file with this Court in, *inter alia, Lee Pharmaceuticals* v. *United States District Court For The Central District Of California, etc.*, No. 77-259, October Term, 1977, dismissed under this Court's Rule 60 on October 31, 1977, ... U.S. ..., 54 L.Ed.2d 295, and in *Lee Pharmaceuticals* v. *Den-Mat, Inc., et al.*, No. 77-244, October Term, 1977, certiorari denied, November 7, 1977, ... U.S. ..., 54 L.Ed.2d 298 (hereinafter "Pet. No. 77-244").

On or about October 3, 1977, real parties in interest in the instant Petition filed in Pet. No. 77-259: (a) a "Memorandum Of Real Parties In Interest In Opposition To Petitioner's Motion To Defer Consideration Of Petition" ("Pet. No. 77-259 Memo."); (b) an "Affidavit Of Arthur L. Martin" ("Pet. No. 77-259 Martin Aff."); and (c) a volume of "Exhibits Referenced In The September 29, 1976 [sic. 1977] Affidavit Of Arthur L. Martin" ("Pet. No. 77-259 Martin Aff. Exhibit Vol.").

> "was filed in the Ninth Circuit *Court of Appeals* on July 15, 1977 *as part of a request for reconsideration* of the July 12, 1977 order [App., at 2a]. A summary denial of reconsideration was entered by that court on July 26, 1977 (App., p. 2a)" Pet., at 14, ¶ 1 (emphasis supplied; footnote omitted).

The respondent District Judge, whose disqualification is sought on the basis of the averments set forth in the affidavit of psychiatrist Yochelson, was never afforded an opportunity to pass upon either the legal or evidentiary[2] sufficiency thereof. *Compare, United States* v. *Gilboy,* 165 F.Supp. 384, 399, n. 26 (M.D. Pa. 1958). Thus, petitioner's second "question" was raised for the first time in the Court of Appeals, upon a request for a *rehearing* following denial of a petition for a writ of mandamus, and is not properly before this Court.

With respect to petitioner's fifth, unreprintable "question" "presented", including its four blasphemous subparts, Pet., at 3, which now and for posterity sully the records of this Honorable Court, petitioner never extended to the District Court an opportunity to rule upon the sufficiency, truth, or falsity of such allegations, and never pointed out to the District Court *any* matter of record which might conceivably support such unsupportable charges of impeachable conduct. Rather, like petitioner's second "question", *supra*, such fifth "question" was "presented" in the first instance to the Court of Appeals. In the premises, real parties respectfully suggest that such fifth "question", too, may not properly be reviewed in this forum.

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[2]See Yochelson Affidavit, ¶¶ 2 and 3 (affiant read petitioner's papers in Ninth Circuit Petition No. 77-1969 *only*), P.App., at 34a, and ¶ 9 ("I have not personally examined Judge Jesse W. Curtis."), P.App., at 36a.

QUESTIONS PRESENTED

1. May a judge's impartiality "reasonably be questioned", pursuant to 28 U.S.C. § 455(a), where he has merely made rulings adverse to a party at some earlier stage in the case?

2. May a litigant move to disqualify his assigned trial judge, pursuant to 28 U.S.C. § 455(a):

(a) only once;

(b) twice;

(c) three times;

(d) four times;

(e) five times (as here); or

(f) an unlimited number of times,

in a single case?

3. Where a judge reasonably believes that a party was acting to disqualify him, and he concluded that such action was contemptuous and reprehensible, but nevertheless calmly controlled his considerable irritation, may such a party reasonably question the judge's impartiality, requiring the latter's disqualification under 28 U.S.C. § 455(a)?

STATUTE INVOLVED

§ 455. Disqualification of justice, judge, magistrate, or referee in bankruptcy

(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

PROCEEDINGS IN THIS COURT

The instant Petition, No. 77-1073, is the third matter brought to the attention of this Court by petitioner following proceedings before Judge Curtis and the Court of Appeals for the Ninth Circuit.

On or about August 13, 1977, petitioner herein filed Petition No. 77-244. That consolidated matter sought review of decisions of the Court of Appeals denying all relief whatsoever in the latter's

(a) Petition for Mandamus No. 76-3628;

(b) Appeal No. 77-1214;

(c) Appeal No. 77-1215;

(d) Petition for Mandamus No. 77-1539; and

(e) Petition for Mandamus No. 77-2547.

On November 7, 1977, this Court denied the petition for a writ of certiorari in No. 77-244. *Lee Pharmaceuticals* v. *Den-Mat, Inc., et al.*, ... U.S. ....., 54 L.Ed.2d 298.

On August 19, 1977, petitioner herein also filed Petition No. 77-259, seeking disqualification of Judge Curtis pursuant to 28 U.S.C. § 455(a). On or about October 11, 1977, petitioner moved, pursuant to this Court's Rule 60(2), to dismiss Petition No. 77-259. Such Petition was so dismissed on October 31, 1977. *Lee Pharmaceuticals* v. *United States District Court for the Central District of California, etc.*, ... U.S. ....., 54 L.Ed.2d 295.

The instant Petition, No. 77-1073, was filed on or about January 30, 1978. On or about February 1, 1978, petitioner moved this Court for a stay of District Court proceedings. By letter dated February 9, 1978, the Clerk of this Court advised counsel to petitioner, the Clerk of the United

States District Court for the Central District of California, the Solicitor General of the United States, and counsel to real parties in interest, as follows:

"Dear Mr. Irons:

"Your application for stay in the above entitled case [A-649 (77-1073)] has been presented to Mr. Justice Rehnquist, who has endorsed thereon the following:

" 'Denied
2/8/78
WHR'

"Very truly yours,
"MICHAEL RODAK, JR., Clerk
"By

"Peter K. Beck
"Assistant Clerk".

STATEMENT OF THE CASE

Petitioner's description of the underlying nature of this case is confined solely to the opening paragraph of its "Statement Of The Case". Pet., at 5. Although articulated in mock solemnity, a careful reading of such "Statement Of The Case", Pet., at 5–21, leads to a conclusion unique in the annals of Anglo-American jurisprudence: A plaintiff, having invoked the jurisdiction of a court to adjudicate alleged wrongs, has abandoned its claims and, concomitantly, commenced a lawsuit-within-a-lawsuit contesting the right of the judicial system of which such court is an element to adjudicate those claims on the bases of facts, evidence, logic, and precedent, even if adverse to such a plaintiff. More starkly stated, petitioner denies that the Courts of the United States possess jurisdiction to make any findings and render any conclusions adverse to it.

Petitioner's denial of the right of the Federal Judiciary to operate independently of its, and of its counsel's, arbitrary whims, are conclusively established by the following facts:

(a) the need for the assigned trial judge to enter *one hundred three (103)* pretrial orders from commencement of this litigation on July 7, 1975 to the present;

(b) the filing by petitioner, and by its counsel, of no fewer than *one hundred thirty four (134)* pretrial motions from July 7, 1975 to the present, only *thirty one (31)*, or 23.1 percent, of which were granted in their entireties;

(c) the filing by petitioner of no fewer than *thirty four (34)* motions seeking, in whole or in part, to compel, to initiate, or to reinitiate, discovery from real parties

in interest, only *seven (7)*, or 20.6 percent, of which were granted in their entireties[3];

(d) the filing by petitioner of no fewer than *ten (10)* motions whose stated purpose was, or whose practical effect, if granted, would have been, entry of a protective order in favor of petitioner, only *four (4)*, or 40.0 percent, of which have been granted in their entireties;

(e) the filing by petitioner of no fewer than *twenty six (26)* motions whose stated purpose was, or whose practical effect, if granted, would have been, to continue a matter, to "defer" a matter, for an extension of time, for a stay, or for a suspension of proceedings, only *twelve (12)*, or 46.2 percent, of which were granted in their entireties[4];

(f) the filing by petitioner of no fewer than *forty-two (42)* motions which sought to affect one or more previously entered, and lawful, Orders of the District Court[5], or positions previously assumed by it, via one or more of amendment, modification, clarification[6], recon-

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[3]A representative District Court Order denying petitioner's motions for discovery is No. 58, set out in Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Exhibit ("Ex.") N.

[4]A representative District Court Order denying one of petitioner's motions for delay is No. 30, set out in Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Ex. L.

[5]The apparent "rationale" for such attempts to affect prior court orders is set forth in an affidavit of counsel to petitioner, a portion of which is set out in the Opposition Brief of real parties in interest in Pet. No. 77-244, Appendix ("App."), at A1-A2.

[6]A representative District Court Order denying one of petitioner's motions for "clarification" is No. 80, set out in Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Ex. U.

sideration[7], vacation[8], challenge, disagreement[9], or simple disobedience[10], only *one (1)*, or 2.4 percent, of which was granted in its entirety;

(g) the filing by petitioner of *five (5)* motions to disqualify the assigned trial judge, each of which was denied[11];

(h) the filing of an affidavit of petitioner's president, in support of petitioner's second motion to disqualify Judge Curtis, directly charging that jurist with impeachable conduct[12];

(i) the filing by petitioner of a third motion to disqualify Judge Curtis on the basis of his alleged "con-

[7]Representative of District Court Orders denying petitioner's motions for "reconsideration" are No. 49, P.App., at 5a-6a; No. 58, set out in Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Ex. N; the September 14, 1977 bench rulings of the Honorable Martin Pence, United States District Judge for the District of Hawaii, P.App., at 10a-30a; and No. 88, P.App., at 31a. *Compare*, Order No. 81, Judge Curtis' ruling upon one of the few motions for "reconsideration" of real parties in interest, set out in Pet. No. 77-259 Martin Aff. Exhibit Vol., at Ex. V.

[8]A representative District Court Order denying one of petitioner's "vacation" motions is No. 75, set out in Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Ex. T.

[9]A representative District Court Order denying the validity of petitioner's objections to a prior order is No. 84, set out in Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Ex. X.

[10]Exemplars of such disobedience are chronicled in, e.g., the District Court's Order Nos. 43 (4th paragraph), 51 (3rd paragraph), 64, 80 (5th paragraph), and 84, set out Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Ex. D, pp. 7-9; Ex. D, pp. 10-12; Ex. D, pp. 13-14; Ex. U; and Ex. X, respectively.

[11]In Order No. 48, P.App., at 4a; No. 49, P.App., at 5a-6a; No. 73, set out in Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Ex. D, pp. 18-19; No. 88, P.App., at 31a; and in a Minute Order filed February 27, 1978.

[12]"Affidavit of Henry L. Lee, Jr. In Support Of Plaintiff's Renewed And Supplemental Motion To Disqualify Assigned Judge", ¶ 3, Pet. No. 77-259, App., at 9a.

fessed incompetence", which motion was denied as "obviously frivolous"[13];

(j) the filing of an affidavit, in the Court of Appeals for the Ninth Circuit, of a *psychiatrist*[14], in support of petitioner's motion for *reconsideration* of the denial of a petition for mandamus to disqualify the assigned trial judge;

(k) the filing by petitioner of a motion whose practical effect, if granted, would have required Judge Curtis to "eat his own words", which motion was denied[15], and which denial was adhered to[16];

(l) the filing by petitioner of a motion for, *inter alia*,

> "(ii) complete revelation of any and all acquaintanceships or other relationships outside the record between the assigned judge or his clerk or any other members of his staff and any defendant or relative by blood or marriage of an individual defendant"

so as

> "to afford the district judge and his staff an opportunity to demonstrate, *if it can be done*, that the appearance of partiality which is manifest on the present record is without factual foundation" (emphasis supplied),

which motion was denied[17];

[13]See Order No. 73, set out in Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Ex. D, pp. 18-19.

[14]Affidavit of Leon Yochelson, P.App., at 34a-42a.

[15]In Order No. 40, filed February 16, 1977.

[16]In Order No. 51, set out in Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Ex. D, pp. 10-12. Petitioner's *counsel* appealed Order No. 51. In its Order filed November 23, 1977, the Court of Appeals for the Ninth Circuit, in No. 77-2054, ruled that "this appeal is dismissed as it is not taken from an appealable order".

[17]In Order No. 43, set out in Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Ex. D, pp. 7-9.

(m) the filing by petitioner of an "Emergency Application For Writ Of Mandamus and Prohibition" in the Court of Appeals for the Ninth Circuit on August 30, 1977, and therein designated as No. 77-2997,

(1) alleging irregularities in the assignment of judicial duties to the Honorable Martin Pence, United States District Judge for the District of Hawaii; and

(2) further alleging that Judge Pence, appointed pursuant to the "Order Of The Chief Judge", P.App., at 9a:

(A) was "[in]capable of being coldly objective toward and detached from Judge Curtis' conduct";

(B) "will not effectively deal with Judge Curtis[']biased and partial conduct";

(C) was obligated to "issue what can only be a rubber stamp verdict"; and

(D) was further obligated to "render a futile decision designed to insure that Judge Curtis is not embarrassed by his tenacious refusal in direct derogation of his judicial oath and duty"[18];

(n) the filing by petitioner of a motion to disqualify counsel to real parties in interest, which was denied[19];

(o) the filing by petitioner of a motion to release from constraints of protective orders entered by the District

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[18]The quoted language appears over the signature, Ninth Circuit Petition No. 77-2997, at 21, of Mary Helen Sears, Esq., a member of the Bar of this Court. Petition No. 77-2997 was denied by the Court of Appeals on September 1, 1977, a mere *two* days following its filing.

[19]In Order No. 89, filed November 9, 1977. Petitioner noticed an appeal from Order No. 89 on November 17, 1977, which has yet to be docketed in the Court of Appeals for the Ninth Circuit. Counsel to petitioner have previously attempted, unsuccessfully, to disqualify opposing counsel in another case. *Ceramco* v. *Lee Pharmaceuticals*, 510 F.2d 268 (2d Cir. 1975).

Court of two affidavits executed by counsel to real parties in interest concerning his clients' proprietary information, so as to allow submission of such affidavits to the State Bar of California in support, apparently, of a proposed grievance charging such counsel with unethical conduct[20];

(p) the filing by petitioner, in the Court of Appeals for the Ninth Circuit, of *six (6)* interlocutory petitions for mandamus[21], each of which, including the one[22] from which the instant Petition arises, was denied without comment;

(q) the filing by petitioner, in the Court of Appeals for the Ninth Circuit, of *two (2)* interlocutory appeals[23], each of which was dismissed without comment for lack of jurisdiction;

(r) the filing by *counsel to petitioner* of *two (2)* interlocutory appeals from District Court Order Nos. 41[24] and 51[25], the latter appeal having been "dismissed as it

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[20]*Compare*, Rule 7-104, Rules of Professional Conduct Of The State Bar of California, to which counsel to petitioner are subject by virtue of Local Rule 1.3(d) of the United States District Court for the Central District of California. The motion to release the "Restricted Information" status of such affidavits was denied by Judge Curtis at a hearing held on February 27, 1978, because, the District Court found, the motion had been filed "in bad faith".

[21]Ninth Circuit Petition No. 76-3028, filed December 17, 1976; No. 77-1539, filed March 11, 1977; No. 77-1969, filed May 6, 1977; No. 77-2547, filed July 15, 1977; No. 77-2997, filed August 30, 1977; and No. 77-3361, filed October 11, 1977.

[22]Ninth Circuit Petition No. 77-3361.

[23]Ninth Circuit Appeal Nos. 77-1214 and 77-1215, both docketed January 31, 1977.

[24]Set out in Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Ex. D, pp. 5-6. This appeal was docketed in the Court of Appeals for the Ninth Circuit as No. 77-1984 on May 3, 1977.

[25]Set out in Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Ex. D. pp. 10-12. This appeal was docketed in the Court of Appeals for the Ninth Circuit as No. 77-2054 on May 11, 1977.

is not taken from an appealable order" on November 23, 1977, the former appeal remaining *sub judice*;

(s) petitioner's noticing of *two (2)* additional appeals, from the District Court's Order No. 87, filed October 21, 1977, dismissing petitioner's application for a preliminary injunction on trademark infringement, trade secret misappropriation, and unfair competition issues, and from Order No. 89, filed November 9, 1977, denying petitioner's motion to disqualify counsel to real parties in interest;

(t) petitioner's bringing to the attention of the Court of Appeals for the Ninth Circuit:

(1) on *seven (7)* separate occasions, the alleged infirmities of the District Court's Order No. 28[26];

(2) on *six (6)* separate occasions, the alleged infirmities of the District Court's Order No. 24, filed November 1, 1976;

(3) on *four (4)* separate occasions, the alleged infirmities of each of the District Court's Order Nos. 17 and 21, each filed October 27, 1976; No. 30[27], filed December 6, 1976; Nos. 40, 41[28], and 43[29], each filed February 16, 1977; and No. 59[30], filed April 25, 1977;

(4) on *three (3)* separate occasions, the alleged infirmities of each of the District Court's Order No. 45[31], filed February 17, 1977; and No. 51[32], filed March 29, 1977; and

[26]See Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Ex. K.
[27]*Ibid.*, at Ex. L.
[28]*Ibid.*, at Ex. D, pp. 5-6.
[29]*Ibid.*, at Ex. D. pp. 7-9.
[30]*Ibid.*, at Ex. O.
[31]*Ibid.*, at Ex. M.
[32]*Ibid.*, at Ex. D. pp. 10-12.

(5) on *two (2)* separate occasions, the alleged infirmities of each of the District Court's Order No. 26, filed November 2, 1976; No. 33, filed December 6, 1976; No. 48 (P.App., at 4a); No. 49 (P.App., at 5a-6a); No. 53, filed April 22, 1977; No. 60[33], filed May 3, 1977; No. 72[34], filed May 26, 1977; No. 84[35], filed August 16, 1977; the "Memorandum to Chief Judge Stephens" (P.App., at 7a-8a); and the "Order Of The Chief Judge" (P.App., at 9a),

upon the beliefs (i) that the court below was unable or unwilling to grasp the quintessence of such infirmities on the first pass; (ii) that a different panel of the Court of Appeal might be unaware of a previous review of a particular District Court Order; or (iii) a combination of each of the foregoing;

(u) petitioner's litigation before *this* Court, in Petition No. 77-244, *cert. denied,* ..... U.S. ....., 54 L.Ed.2d 298, of the power of two-judge panels of the Court of Appeals for the Ninth Circuit, in the absence of disagreement between members of such panel, to hear and determine cases and controversies consistent with the requirements of 28 U.S.C. §§ 46(b)–(d);

(v) petitioner's apparent present contention, Pet., at 29, that this Court's denial of certiorari in *Amalgamated Sugar Co.* v. *United States District Court for the Northern District of California,* No. 77-4, ... U.S. ....., 54 L.Ed. 2d 125, was incorrect, and that the identical issues raised in that and in this Petition should be relitigated, *now,* with this Petition functioning as an appropriate vehicle

[33]*Ibid.*, at Ex. P.
[34]*Ibid.*, at Ex. S.
[35]*Ibid.*, at Ex. X.

for this Court's "reconsideration" of its decision in No. 77-4[36]; and

(w) the noticing, by present *counsel to petitioner*, on February 28, 1978, of an appeal from the District Court's Order No. 98, filed the previous day, which denied petitioner's motion to vacate an Order of Reference to a Special Master of specifically designated trade secret issues, petitioner's *eight (8)* purported objections to the Order of Reference being variously characterized by Judge Curtis as:

(1) "obviously without merit and frivolous";

(2) "[i]t is inconceivable that plaintiff with this background [of specifically identified orders of the District Court] can make this objection in good faith";

(3) "also contrived";

(4) "likewise frivolous" and "meaningless";

(5) "impertinent in the extreme and . . . therefore stricken"[37]; and

(6) "being made in jest",

such Order No. 98 concluding:

"No[t] only is this motion completely without arguable support, it is vexatious, impertinent, and the very quintessence of bad faith. Not only should it be denied, but sanctions must be imposed.

"IT IS THEREFORE ORDERED that plaintiff's motion to vacate Order No. 94 is denied and,

[36]*See* nn. 5-9, *supra*, and accompanying text.

[37]With respect to petitioner's "reasserting its belief that this court 'has acted without detached impartiality,' [and] that it has imparted this lack of impartiality and prejudice to the special master by verbal communications."

"The court finds that plaintiff's motion to vacate Order No. 94 filed by the firm of Irons & Sears has so multiplied the proceedings in this case as to increase the costs unreasonably and vexatiously, accordingly, pursuant to Title 28 U.S.C. § 1927,

"IT IS HEREBY ORDERED that the firm of Irons & Sears shall pay to defendants' counsel the sum of $500.00 within twenty-one (21) days from the date hereof."[38]

Despite:

(a) "a maneuver on the part of the plaintiff to further delay the progress of the lawsuit"[39]

(b) the District Court's "opinion [that] the petition for writ of mandamus [Ninth Circuit No. 76-3628] is without cause to stay any proceedings, and has been

[38]On March 1, 1978, one day following the filing of their notice of appeal, *counsel to petitioner* filed a motion "That All Copies Of Order No. 98 And February 27, 1978 Hearing Transcript Be Placed Under Seal . . . ", and seeking an order, *inter alia*, to the effect that

"(2) No copies of Order No. 98 or the February 27, 1978 hearing transcript and no information concerning the content of either shall be disseminated, published or disclosed in any manner to a third party, *except as a part of and in the course of proceedings that may ensue before a higher court having jurisdiction to review this court's activities* . . . . " (emphasis supplied).

With slack-jawed disbelief, real parties in interest noted the following naked *threat* to a United States District Judge in the "memorandum" in support of the motion of petitioner's counsel to seal:

"It is not the desire of plaintiff's counsel to prolong the unpleasantness of this litigation by resort to further actions, including actions for libel and slander or related relief."

Instead of paying the $500 and being done with it, petitioner's counsel, on March 2, 1978, noticed an *ex parte* hearing for March 6, 1978, at 2:30 p.m., for the purposes of obtaining a stay of Order No. 98 and of the setting of a supersedeas bond.

[39]Order No. 30, Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Ex. L, p. 2, ¶ 4.

filed for the purpose of further delaying the trial of this lawsuit"[40];

(c) the District Court's "view" that "the filing of such a motion ["for full disclosure of all off-the-record communications between court personnel and defendants, their representatives and counsel"] under the circumstances is contemptuous. Beyond that it is frivolous and impertinent"[41];

(d) the fact that petitioner's counsel "has become angry with this court because of a series of adverse rulings which have apparently frustrated her litigation strategy", P.App., at 4a;

(e) the fact that "[p]laintiff's motion is totally improper and a flagrant violation of Local Rule 3(k). This court has already imposed sanction[s] upon plaintiff's counsel for two prior violations of this rule"[42];

(f) "plaintiff's litigious propensities as clearly demonstrated by the history of this lawsuit"[43];

(g) "this [District] court's view . . . [that Ninth Circuit] appeal [No. 77-1984] is frivolous and . . . has been filed for the purpose of thwarting this court's efforts to move this case toward its ultimate determination with a minimum of delays and unnecessary pretrial procedures"[44];

(h) the fact that "[i]t is only unusual circumstances that this [District] court would deny a party the right

[40]Order No. 42, filed February 16, 1977, at ¶ 7.
[41]Order No. 43, Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Ex. D, p. 8.
[42]Order No. 58, *Ibid.*, at Ex. N.
[43]Order No. 69, Ibid., at Ex. D, p. 16.
[44]*Ibid.*

to be heard orally on motions of this kind. There are, however, unusual circumstances in this case. In this court's view, this motion [to vacate Order No. 72] has been filed for the sole purpose of disrupting this court's efforts to move this case along toward some ultimate conclusion"[45]; and

(i) the fact that "plaintiff ["for nearly fifteen months"] thus far has thwarted every effort of the court to obtain" an identification of "what trade secrets it asserts are being misappropriated"[46],

real parties in interest, *on the merits,* have managed to effect the dismissal of petitioner's application for a preliminary injunction with respect to trademark infringement, trade secret misappropriation, and unfair competition, and have filed two motions for partial summary judgment with respect to such issues. A third motion for partial summary judgment, with respect to patent invalidity and lack of infringement, remains in preparation.

The labor required to give birth to the instant Petition—the *sole* offspring produced by petitioner and its counsel after nearly two years and eight months of white-lipped straining—has required the obstetrical knowledge of two United States District Judges, the Chief Judge of a United States District Court, and their collective issuance of *one hundred five (105)* orders. Furthermore, because of the breach posture of the instant fetus-Petition, at least *twelve (12)* United States Circuit and Senior Circuit Judges have warned petitioner on no fewer than *twenty (20)* occasions,

[45]Order No. 75, Pet. No. 77-259 Martin Aff. Exhibit Vol., n. 1, *supra*, at Ex. T, p. 2.
[46]Order No. 80, Ibid., at Ex. U, at p. 1.

by *their* collective orders, that the probability of a stillbirth was not less than 100 percent.[47]

The instant Petition must rank as one of the most, if not *the* most, scurrilous document ever filed in an English-speaking court, which real parties will shortly seek to strike as violative of this Court's Rule 40(5), and which, remarkably, is the *fourth* Petition[48] filed in this Court by present counsel to petitioner in the four Terms last past seeking to disqualify a United States District Judge before whom one or both of such counsel were appearing.

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[47]Participation by Circuit and Senior Circuit Judges in Orders of the Court of Appeals for the Ninth Circuit reviewing the rulings of Judge Curtis were as follows: Hon. James R. Browning, Chief Judge—two orders; Hon. Richard H. Chambers—two orders; Hon. Herbert Y. C. Choy—six orders; Hon. Ben Cushing Duniway—one order; Hon. Walter Ely—two orders; Hon. Alfred T. Goodwin—one order; Hon. Shirley M. Hufstedler—two orders; Hon. Proctor Hug, Jr.—one order; Hon. Anthony M. Kennedy— one order; Hon. Joseph T. Sneed—one order; Hon. Ozell M. Trask—five orders; Hon. J. Clifford Wallace—six orders; and the Ninth Circuit's "*active bench*"—one order.

[48]The instant Petition, No. 77-1073; the immediate precursor thereto, No. 77-259; *Irons* v. *Gottschalk*, 548 F.2d 992, 993-994 (D.C. Cir. 1976) (Mr. Justice Clark), *cert. denied sub nom. Irons* v. *Parker* (No. 77-203), ... U.S. ..., 54 L.Ed.2d 451 (November 28, 1977); and *Irons* v. *Dann* (No. 74-620), *cert. denied*, 420 U.S. 946 (1975).

ARGUMENT

1. Public Confidence In The Federal Judicial System Would Be Weakened, Not Strengthened, Should This Court Review (a) The Refusal Of Judge Curtis To Disqualify Himself, And (b) Affirmance Of The Correctness Of That Jurist's Decision By The Court Of Appeals.

The "strongest" argument advanced by petitioner for granting of the writ is articulated as follows:

> "In part, the sabotage of Congressional intent that is effectively occurring in the lower federal courts *may* result from the failure of Congress to specify what procedure is to be utilized, *including who shall determine the issue* of 'whether his impartiality might reasonably be questioned' *and what evidence is to be considered....*" Pet., at 22 (emphasis supplied).

While that argument may be persuasive in other cases, it starkly does not fit the facts of the instant Petition. Initially, the plain fact is that there has occurred an independent review of the assigned trial judge's "impartiality", and whether the same "might be reasonably be questioned"—by Judge Pence. P.App., at 10a-30a. Secondly, the legislative history of the 1974 amendments to 28 U.S.C. § 455(a) may be searched in vain for even one scintilla of debate—or Committee findings—that Congress intended that the affidavit of a psychiatrist—*and a psychiatrist who has not examined the challenged judge and who has only read papers presented to him by an interested litigant*—is, or can be, evidence on the issue of "impartiality". Significantly, petitioner points to no case authority, nor has the research of real parties uncovered any, sustaining the evidentiary worth of such an affidavit in judicial disqualification proceedings.

Should this Court grant certiorari:

(a) the citizenry would be appalled and flabbergasted to learn of the massive judicial personpower which unstintingly has been poured into this case to bring it to its present posture[49];

(b) disappointed citizen litigants, and their disappointed counsel, would take heart and emulate the conduct of petitioner, and of its counsel, herein, further diluting the perpetually slim resources of an already overworked Federal Judiciary; and

(c) the conduct complained of by the trial judge in *In Re Union Leader Corp.*, 292 F.2d 381 (1st Cir. 1961), *cert. denied,* 368 U.S. 927 (1961), namely:

> "It is true that your client has been in the business of attacking me, but I haven't attacked your client. And I regard his misconduct as giving no basis for alleging misconduct on my part", 381 F.2d, at 388,

would be directly and proximately sanctioned.

Petitioner's "public confidence" argument—in the factual setting of this case—leads to a conclusion exactly contrary to that advanced by petitioner.

2. The Remaining Arguments Advanced By Petitioner In Support Of Granting The Writ Have Been Considered Recently By The Court And Found Unworthy Of Review.

Petitioner contends, Pet., at 25-29, that the decision below conflicts with decisions from other lower federal courts, and further, *Ibid.*, at 29-30, that the Court Of Appeals For The Ninth Circuit has exhibited a disinclination to use the

[49]See n. 47, *supra* and accompanying text.

writ of mandamus to correct judicial abuses. Each of these issues was recently considered by this Court in *Amalgamated Sugar Co.* v. *United States District Court For The Northern District Of California,* No. 77-4, *cert. denied,* ..... U.S. ....., 54 L.Ed.2d 125 (October 31, 1977). Not yet in this Court's Official Reports, petitioner is simply asking this Court to "reconsider" its denial of the Writ in that case. *Compare,* notes 5-9, and accompanying text, *supra,* at 9-10.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Dated: March 6, 1978

Respectfully submitted,

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